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The Validity of *United States v. Nazemian* Following *Crawford* and Its Progeny: Do Criminal Defendants Have the Right to Face Their Interpreters at Trial?

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THE VALIDITY OF *UNITED STATES V. NAZEMIAN* FOLLOWING *CRAWFORD* AND ITS PROGENY: DO CRIMINAL DEFENDANTS HAVE THE RIGHT TO FACE THEIR INTERPRETERS AT TRIAL?

John Kracum*

TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION..... | 431 |
| I. <i>MIRANDA</i> , <i>NAZEMIAN</i> , AND THE ADMISSIBILITY OF POLICE INTERPRETERS' STATEMENTS | 434 |
| A. <i>Miranda v. Arizona</i> and Police Interrogation Through Interpreters | 434 |
| B. <i>Nazemian's</i> Solution to the Hearsay/Confrontation Problem.... | 436 |
| II. MODERN CONFRONTATION CLAUSE JURISPRUDENCE | 439 |
| A. <i>Crawford v. Washington</i> | 439 |
| B. <i>Davis v. Washington</i> | 442 |
| C. <i>Melendez-Diaz v. Massachusetts</i> | 444 |
| D. <i>Bullcoming v. New Mexico</i> | 447 |
| III. <i>ORM HIENG'S</i> ANALYSIS OF POLICE INTERPRETER STATEMENTS' ADMISSIBILITY | 449 |
| A. Majority's Treatment of <i>Nazemian</i> Post- <i>Crawford</i> | 449 |
| B. Judge Berzon's Concurrence | 450 |
| CONCLUSION | 456 |

INTRODUCTION

More than ever before, the U.S. justice system is under pressure to provide competent language interpretation. The U.S. Census Bureau reported that, as of 2010, approximately forty million foreign-born

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individuals reside in the United States,¹ an increase of approximately nine million over the same population ten years earlier.² Of those forty million residents, approximately one in ten spoke no English, while approximately two in ten did not speak English well.³ Also in 2010, the federal courts saw a 13.8% increase in the number of annual interpretation events at the district court level,⁴ where the court must provide interpreters for all criminal cases and civil cases brought by the United States.⁵ Over one-third of those interpretation events took place in the Ninth Circuit, an area bordering Mexico and more impacted by nonnative speakers than the majority of the country.⁶

This need for language interpretation in our justice system is growing alongside an uncertainty about the right to confrontation. The Supreme Court in *Crawford v. Washington* has labeled as “testimonial” some types of out-of-court statements, ruling that they are no longer admissible in criminal cases without the opportunity for the defendant to cross-examine the declarant.⁷ Examples of testimonial statements traditionally include forensic reports, statements made to establish facts, and statements made during police interrogation.⁸ Powering the modern understanding of the Confrontation Clause⁹ is the Framers’ fear that testimony not subjected to

¹ ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, ACS-19, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 2 tbl.1 (2012), available at <http://goo.gl/9MDGDt>.

² See NOLAN MALONE ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION: 2000, at 1 (2003), available at <http://goo.gl/x5MQo6>.

³ GRIECO ET AL., *supra* note 1, at 15 fig.12.

⁴ *Interpreting: An Every-Day Event in Federal Courts*, THE THIRD BRANCH (May 2011), <http://goo.gl/SE8abR>.

⁵ See 28 U.S.C. § 1827(d) (2006).

⁶ See *Interpreting: An Every-Day Event in Federal Courts*, *supra* note 4.

⁷ 541 U.S. 36, 59 (2004). A “declarant” is the source of the original statement. FED. R. EVID. 801(b).

⁸ See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–14 (2009); *Crawford*, 541 U.S. at 51–56; see also John R. Grimm, Note, *A Wavering Bright Line: How Crawford v. Washington Denies Defendants a Consistent Confrontation Right*, 48 AM. CRIM. L. REV. 185, 196 (2011).

⁹ The Confrontation Clause, embedded within the Sixth Amendment, gives each criminal defendant the right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI. For scholarship regarding *Crawford*’s effect and the boundaries of testimonial statements broadly, see, for example, Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301 (2011); Brooks Holland, *Crawford & Beyond: How Far Have We Traveled from Roberts After All?*, 20 J.L. & POL’Y 517 (2012); Grimm, *supra* note 8, at 196–97.

“the crucible of cross-examination” may unjustly prejudice a court against a criminal defendant who should have the right to face his accuser.¹⁰

In its 2012 opinion in *United States v. Orm Hieng*, the Ninth Circuit Court of Appeals recognized a tricky issue regarding one of those types of testimonial statements—statements made during police interrogation.¹¹ The court was faced with an instance in which a police officer testified about statements made during the interrogation of a defendant who required the use of an interpreter.¹² The trial court granted a motion to exclude witnesses from the courtroom but allowed the interpreter who assisted in his police interrogation to remain.¹³ By doing so, the court implicitly ruled that the interpreter was “not a percipient or fact witness.”¹⁴ On appeal, the defendant argued that the interpreter’s statements could not be admitted as evidence if the defendant was refused the opportunity to face the interpreter.¹⁵ One can imagine that the Framers’ fear, which generated the Confrontation Clause, is especially felt by non-English speaking defendants, who cannot gain firsthand knowledge of either the statements their interpreters relay to their questioners during police interrogation or the statements to which the police officers testify at trial. However, the majority of the Ninth Circuit panel, relying on its analysis in *United States v. Nazemian*,¹⁶ found that, so long as the interpreter in question acted as a mere language conduit, the defendant himself was the declarant of the statements, and he therefore had no constitutional right to confront his interpreter.¹⁷

In a concurring opinion, however, Judge Berzon challenged the validity of *Nazemian*’s language conduit test.¹⁸ First, Judge Berzon questioned the “unity between hearsay concepts and Confrontation Clause analysis” on which the *Nazemian* holding was founded.¹⁹ Second, Judge Berzon pointed out dissonance between *Nazemian*’s holding and the Supreme Court’s reasoning in both *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*.²⁰ Based on those two considerations, Judge

¹⁰ *Crawford*, 541 U.S. at 61.

¹¹ See *United States v. Orm Hieng*, 679 F.3d 1131, 1135 (9th Cir. 2012).

¹² *Id.* at 1136–37.

¹³ *Id.* at 1137.

¹⁴ *Id.* at 1139.

¹⁵ *Id.* at 1138–39.

¹⁶ 948 F.2d 522, 528 (9th Cir. 1991).

¹⁷ *Orm Hieng*, 679 F.3d at 1138–41.

¹⁸ See *id.* at 1149 (Berzon, J., concurring).

¹⁹ *Id.*

²⁰ See *id.* See generally *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

Berzon was unwilling to accept silently the majority's Confrontation Clause analysis.

The purpose of this Comment is to question *Nazemian's* continued validity based on the two criticisms offered by Judge Berzon's concurrence in *Orm Hieng*. Part I describes the process by which *Nazemian's* language conduit test has allowed the admissibility of statements made through an interpreter during police interrogation. Part II outlines the current state of Confrontation Clause jurisprudence based on several recent Supreme Court opinions. Finally, Part III considers both the majority and concurring analysis of the confrontation issue in *Orm Hieng*, referencing the evolving Confrontation Clause doctrine and the development of that doctrine in the area of forensic report admissibility. By comparing Confrontation Clause doctrine regarding forensic reports to the issue in *Orm Hieng*, this Comment argues that the purpose of police interrogation, the practical effect of confrontation, and the irrelevance of any perceived quality of witnesses suggest that police interpreters should be subject to confrontation. Interpreter confrontation is relevant in a country where over three million people cannot understand English and where interpreters are used 350,000 times each year in its courts.²¹ The issue of *Nazemian's* continued application may reemerge in en banc review of a future case.

I. *MIRANDA*, *NAZEMIAN*, AND THE ADMISSIBILITY OF POLICE INTERPRETERS' STATEMENTS

A. *MIRANDA V. ARIZONA* AND POLICE INTERROGATION THROUGH INTERPRETERS

A suspect of a criminal investigation has the right to refuse to answer questions during custodial interrogation by police.²² *Miranda v. Arizona*

²¹ GRIECO ET AL., *supra* note 1, at 15 fig.12; *Interpreting: An Every-Day Event in Federal Courts*, *supra* note 4.

²² See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); see also U.S. CONST. amend. V. The *Miranda* Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. This Comment is limited to cases in which police interrogation has not violated a defendant's *Miranda* rights such that the only relevant admissibility questions are hearsay and confrontation. For discussion of *Miranda* issues as they relate specifically to non-English speakers and interpreters, see Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1 (1999); Richard Rogers et al., *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, 33 LAW & HUM. BEHAV. 61 (2009); Alison R. Perez,

guaranteed that right to criminal suspects by requiring that police employ specific safeguards before beginning a custodial interrogation: a warning that the suspect has a right to remain silent; a warning that any statement the suspect makes may be used against that suspect in court; and a disclosure that the suspect has a right to a retained or appointed attorney.²³ Only upon a waiver of those rights made “voluntarily, knowingly and intelligently” may police obtain statements admissible in court.²⁴

Once a voluntary, knowing, and intelligent waiver of the right to remain silent is made, statements made during interrogation can be used as evidence against that suspect at trial.²⁵ Typically, the interrogating police officer enters such evidence as testimony.²⁶ This is the case even when the interrogation requires an interpreter.²⁷ However, this method of providing evidence creates a hearsay problem when an interpreter is required. The Federal Rules of Evidence define hearsay as “a person’s oral assertion, written assertion, or nonverbal conduct . . . intended . . . as an assertion” made outside of the current tribunal and offered to prove that the assertion is true.²⁸ Unless such a statement is excluded from or falls within an exception to the hearsay rule, it is inadmissible in court.²⁹

One exclusion from the hearsay rule provides that a statement made by a party and offered against that party at trial is not hearsay.³⁰ Based on that exclusion, statements made by a criminal defendant during police interrogation are not hearsay because those statements were made by the defendant and are offered against the defendant at trial.³¹ When an interpreter is used in the process of the interrogation, however, the police officer acting as a witness at trial does not testify about the defendant’s statements—he testifies about the interpreter’s statements. In that instance, the hearsay exclusion that allows testimony about statements made during police interrogation may or may not apply.

Note, *Understanding Miranda: Interpreter Rights During Interrogation for Spanish-Speaking Suspects in Iowa*, 12 J. GENDER RACE & JUST. 603 (2009).

²³ *Miranda*, 384 U.S. at 444.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 469 (1999); see also 23 AM. JUR. 2D *Proof of Facts* §§ 10–17 (2012).

²⁷ See, e.g., *United States v. Orm Hieng*, 679 F.3d 1131, 1136–37 (9th Cir. 2012).

²⁸ FED. R. EVID. 801(a), (c).

²⁹ FED. R. EVID. 802.

³⁰ See *id.* 801(d)(2)(A).

³¹ See, e.g., *United States v. Miller*, 725 F.2d 462, 466–67 (8th Cir. 1984).

Prior to 2004, there was room to argue that the hearsay problem created a Confrontation Clause issue as well.³² Before the Supreme Court altered the Confrontation Clause doctrine with its opinion in *Crawford*, the Court interpreted the Confrontation Clause to give criminal defendants the right to confront any declarant making statements against them by cross-examining that declarant at trial, unless the statements made by that declarant showed “particularized guarantees of trustworthiness” or fell within a “firmly rooted hearsay exception.”³³ Because no hearsay exception applied to an interpreter’s statements, courts were left with the ambiguous question of whether the interpreter’s statements showed particularized guarantees of trustworthiness. It was this area of ambiguity that the Ninth Circuit attempted to resolve with its opinion in *United States v. Nazemian*.³⁴

B. NAZEMIAN’S SOLUTION TO THE HEARSAY/CONFRONTATION PROBLEM

The Ninth Circuit’s opinion in *Nazemian* attempted to clarify the question of whether statements made by interpreters in police interrogations qualify as hearsay and are subject to the Confrontation Clause.³⁵ The defendant in *Nazemian* was charged with conspiracy to possess heroin with intent to distribute, among other charges.³⁶ The defendant argued that statements he made to a DEA agent were inadmissible hearsay and that admitting the statements violated the Confrontation Clause because a third-party interpreter, who did not testify at trial, translated the statements.³⁷

The Ninth Circuit panel identified a threshold question that controlled both the Confrontation Clause analysis and hearsay analysis: Should the statements in question be attributed to the interpreter or to the defendant?³⁸ If the defendant were treated as the declarant, the statements would fit into the same hearsay exclusion as noninterpreted statements during police investigation.³⁹ Likewise, the Confrontation Clause problem would vanish; not only would the statements fall within a hearsay exception, but any defendant interested in confronting the declarant of the statements would

³² See, e.g., *United States v. Nazemian*, 948 F.2d 522, 525 (9th Cir. 1991).

³³ *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980).

³⁴ 948 F.2d at 525–26.

³⁵ *Id.* at 525–28.

³⁶ *Id.* at 524.

³⁷ *Id.* at 525.

³⁸ *Id.* at 525–26.

³⁹ *Id.* at 526.

have the opportunity to do so, because the declarant would be the defendant himself.⁴⁰

The court first analogized to another category of third-party statements already attributed to criminal defendants—adoptive admissions.⁴¹ An adoptive admission is a statement that a defendant does not make but manifests that she adopts it or believes it to be true.⁴² Quoting the Sixth Circuit, the court explained that adoptive admissions “avoid[] the confrontation problem because the words of the hearsay become the words of the defendant.”⁴³ According to the Sixth Circuit, adoptive admission constitutes a “special indicium of reliability” that removes the need for confrontation.⁴⁴

The Ninth Circuit subsequently described two then-current trends in federal courts grappling with this issue. First, the court referenced several rulings from other circuits in which they treated interpreters as agents of the defendants.⁴⁵ Like adoptive admissions, admissions by an agent of a defendant fall within an exclusion to the hearsay rule⁴⁶ and are therefore attributable directly to the defendant for the purpose of Confrontation Clause analysis.⁴⁷ Second, the court referred to rulings where statements were attributed directly to the defendants by treating the interpreters as “language conduit[s].”⁴⁸ Under this language conduit theory, accurate interpretation by an individual with no motive to mislead or distort does not create a layer of hearsay.⁴⁹ Instead, testimony about those statements falls “within the same exception to the hearsay rule as when a defendant and another are speaking the same language.”⁵⁰

The Ninth Circuit then discussed the practical difficulties of adopting a rule requiring an alternate solution—that in each criminal investigation requiring a translator, the translator must either be appointed by the court or

⁴⁰ *Id.* at 525–26.

⁴¹ *Id.* at 526.

⁴² *See* FED. R. EVID. 801(d)(2)(B); *see also* *United States v. McKinney*, 707 F.2d 381, 384 (9th Cir. 1983).

⁴³ *Nazemian*, 948 F.2d at 526 (quoting *Poole v. Perini*, 659 F.2d 730, 733 (6th Cir. 1981) (internal quotation mark omitted)).

⁴⁴ *Poole*, 659 F.2d at 733.

⁴⁵ *See Nazemian*, 948 F.2d at 526 (citations omitted).

⁴⁶ *See* FED. R. EVID. 801(d)(2)(D).

⁴⁷ *Nazemian*, 948 F.2d at 526.

⁴⁸ *Id.* (quoting *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989) (internal quotation marks omitted)).

⁴⁹ *See Koskerides*, 877 F.2d at 1135.

⁵⁰ *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973).

provided by the defendant.⁵¹ The latter solution might have lent more credibility to the theory that the translator is an agent of the defendant, but the court rejected the approach.⁵² The court voiced a concern about creating “a largely arbitrary distinction” between criminal defendants based on each defendant’s language ability and access to a translator.⁵³ The court also noted that the impact on undercover investigations would be burdensome on police, whereas translation “in the course of an . . . interrogation following arrest” could be recorded or achieved by a translator at trial.⁵⁴

Embracing an approach based on the agency and language conduit theories,⁵⁵ the *Nazemian* court held that the differentiation between language conduits (interpreters not subject to confrontation) and interpreter-declarants (interpreters subject to confrontation) must be based on four relevant factors previously discussed by other circuits.⁵⁶ First, a court may consider which party supplied the interpreter.⁵⁷ Second, the court may take into account any motivation the interpreter may have had to distort the conversation or mislead the parties.⁵⁸ Third, the court may analyze the interpreter’s language skill along with any qualifications.⁵⁹ Fourth, the court may investigate whether any acts following the conversation were consistent with the translated statements.⁶⁰ When the relevant factors show that the interpreter acted as an agent of the defendant or as a language conduit, the defendant may be the declarant of the interpreted statements.⁶¹ Therefore, the statements can generally be

⁵¹ *Nazemian*, 948 F.2d at 526–27. This potential solution to the translator hearsay problem came from an earlier Ninth Circuit opinion holding the “agency-language-conduit theory” to be inapplicable in a case where the translator was a guard at a prison camp at which the defendant was incarcerated. *United States v. Felix-Jerez*, 667 F.2d 1297, 1300 n.1 (9th Cir. 1982).

⁵² *Nazemian*, 948 F.2d at 527.

⁵³ *Id.*

⁵⁴ *Id.* at 527 n.7.

⁵⁵ The Ninth Circuit panel in *Orm Hieng* explained that *Nazemian* created the analytical framework for differentiating between interpreter-declarants and language conduits. *See United States v. Orm Hieng*, 679 F.3d 1131, 1139–40 (9th Cir. 2012). However, *Nazemian* adopted a hybrid of the agency theory and language conduit theory that predated it. *Nazemian*, 948 F.2d at 527–28 (discussing “factors which may be relevant [to] . . . agency or conduit theory” and concluding that the district court could have treated the interpreter “as a mere language conduit or as *Nazemian*’s agent”).

⁵⁶ *Nazemian*, 948 F.2d at 527.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 528.

admitted without consideration of the Confrontation Clause or any related hearsay problem.

II. MODERN CONFRONTATION CLAUSE JURISPRUDENCE

Thirteen years after *Nazemian*, the Supreme Court reexamined the Confrontation Clause with the first of a series of cases that has altered that constitutional landscape. Overturning *Ohio v. Roberts*,⁶² the Court in *Crawford v. Washington* and its progeny spawned thousands of discussions based on a criminal defendant's right to face her accuser.⁶³ The Supreme Court has used these cases, in part, to divorce Confrontation Clause analysis from hearsay analysis by no longer making hearsay analysis dispositive of Confrontation Clause questions. The Supreme Court has also modified the category of evidence that implicates the Confrontation Clause. The shift in the connection between the Confrontation Clause and the law of evidence that governs hearsay analysis, as well as the modern application of the Confrontation Clause to forensic analysis and child testimony, provides insight to the question of a defendant's right to confront the interpreter present at his police interrogation. This Part examines four recent Supreme Court decisions, starting with *Crawford*, that shape the area of constitutional law relevant to Judge Berzon's concurrence in *Orm Hieng*.

A. CRAWFORD V. WASHINGTON

The issue in *Crawford v. Washington* stemmed from the trial court's decision to admit the defendant's wife's out-of-court statements without allowing the defendant to confront his wife through cross-examination.⁶⁴ Prior to the grant of certiorari, courts applied the then-controlling test from *Ohio v. Roberts* and reached conflicting opinions regarding the statements' admissibility under the Confrontation Clause.⁶⁵ Rather than provide a more detailed definition of the *Roberts* test, the Supreme Court reconsidered the text and the history of the Confrontation Clause.⁶⁶ That reconsideration

⁶² 448 U.S. 56 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2003).

⁶³ As of October 21, 2013, Westlaw lists 36,712 sources that cite *Crawford*.

⁶⁴ 541 U.S. 36, 38–40 (2004).

⁶⁵ *See id.* at 40–41. The State of Washington trial court originally admitted the testimony. *Id.* at 40. On appeal, the state appellate court reversed, but that ruling was reversed again by the Washington State Supreme Court. *Id.* at 41. Each court tested the reliability of the statements per *Roberts*'s instruction but disagreed as to the sufficiency of the statement's reliability. *Id.* at 40–41.

⁶⁶ *Id.* at 42–56.

formed the basis of a new test for a defendant's right to confrontation—an analysis of the testimonial nature of the statements to be admitted.⁶⁷

In considering the genesis and history of the Confrontation Clause, the Supreme Court examined the evils the Sixth Amendment was designed to confront.⁶⁸ The Court described the trial of Sir Walter Raleigh, an Englishman convicted of treason on the weight of a damning letter written by an alleged accomplice.⁶⁹ The Court also discussed practices in the early eighteenth century American colonies, where admiralty courts refused defendants the right to confrontation, a practice that sparked protests from colonial representatives and defense lawyers alike.⁷⁰ In addition, the Court considered the reaction to the Constitution, as it was originally ratified, without a right to confrontation.⁷¹ The Court noted that “the principal evil at which the Confrontation Clause was directed” was the threat of convictions based on *ex parte* evidence—an objectionable judicial practice that Raleigh described as reminiscent of the Spanish Inquisition.⁷²

The Court's historical analysis led it to two conclusions: first, that interpretation of the Confrontation Clause must be guided by the desire to avoid procedures that allow admission of the type of *ex parte* evidence admitted against Sir Walter Raleigh; and second, that the evidence thus barred could only be allowed based on a finding that the declarant was both unable to testify at trial and had previously been made available for cross-examination.⁷³ The Court expounded on the first of those conclusions in two ways. The Court first rejected the notion that the law of evidence was strong enough to protect defendants from the sort of evidence that compelled the adoption of the Confrontation Clause.⁷⁴ Instead, the Court created a new categorization of statements—testimonial and nontestimonial.⁷⁵ Although the Court did not directly define these two

⁶⁷ *Id.* at 53–54, 59, 68.

⁶⁸ *Id.* at 43–50.

⁶⁹ *Id.* at 44. The letter was read at trial, where Raleigh demanded that the author, Lord Cobham, be brought to face him in public. *Id.* Raleigh suspected that Cobham would not be able to repeat the alleged lies that he had written in the letter if he was required to do so in person in front of a judge and jury. *Id.* The judges did not allow Raleigh to call Cobham into court, and Raleigh was sentenced to death. *Id.*

⁷⁰ *Id.* at 47–48.

⁷¹ *Id.* at 48–49.

⁷² *Id.* at 49–50.

⁷³ *Crawford*, 541 U.S. at 50–51, 53–54.

⁷⁴ *Id.* at 51 (“Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”).

⁷⁵ *Id.* at 51, 68.

categories,⁷⁶ it provided guidelines for lower courts in making the distinction. Those guidelines included three viable definitions as well as a list of types of statements that “at a minimum” must be considered to be testimonial: “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [] police interrogations.”⁷⁷

The second way the Court expounded on the goal to avoid inquisitorial procedures was by explicitly rejecting the approach taken by *Ohio v. Roberts*.⁷⁸ The Court determined that the *Roberts* standard was at once too broad and too narrow. It applied to both testimonial and nontestimonial statements but failed to exclude certain testimonial ex parte statements.⁷⁹ The majority was especially troubled by *Roberts*’s holding that the Confrontation Clause could be satisfied by a “mere judicial determination of reliability.”⁸⁰ The Court found the *Roberts* standard to be “amorphous,” “subjective,” and “unpredictable.”⁸¹ Most importantly, the Court was able to identify a long list of instances in which “statements that the Confrontation Clause plainly meant to exclude” were admitted at trial under the *Roberts* test.⁸² Such a result was unacceptable to the *Crawford* Court, and it overruled *Roberts*.⁸³

Having identified the class of statements to which the Confrontation Clause was intended to apply and having rejected the *Roberts* reliability test as unreliable, the Court affirmed the necessity of cross-examining testimonial declarants: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁸⁴ With that concluding remark, *Crawford* punctuated its landmark shift from allowing courts to

⁷⁶ A significant portion of the debate generated by *Crawford* has been based on the (in)adequacy of the Court’s definition of testimonial statements. See, e.g., Cicchini, *supra* note 9, at 1308–10; Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 273–74 (2005).

⁷⁷ *Crawford*, 541 U.S. at 68.

⁷⁸ *Id.* at 60.

⁷⁹ *Id.*

⁸⁰ *Id.* at 62.

⁸¹ *Id.* at 63. The Court stressed the notion of subjectivity by providing examples of lower court opinions in which “opposite” situations caused those courts to find the statements more reliable in each case. *Id.*

⁸² *Id.* at 63–65. The majority specifically noted that courts had admitted accomplice confessions that implicated defendants, plea allocutions acknowledging conspiracies, grand jury testimony, and prior trial testimony.

⁸³ *Id.* at 67–69.

⁸⁴ *Id.* at 68–69.

apply hearsay principles and reliability determinations to giving defendants an immutable right to confront any testimonial declarant.

B. *DAVIS V. WASHINGTON*

In 2006, the Supreme Court began to refine its definition of testimonial statements when it granted certiorari to a pair of cases that tested the testimonial nature of statements made during police interrogation.⁸⁵ The resulting decision, *Davis v. Washington*, altered the *Crawford* analysis by establishing the primary purpose test—the notion that the testimonial nature of a statement may be determined by questioning whether the statement was made with criminal prosecution in mind.⁸⁶ Although the Court was careful not to restrict the definition of “testimonial” to a pure analysis of a statement’s purpose, *Davis* began moving the definition away from *Crawford*’s original set of unclear potential definitions.

Davis analyzed the admissibility of two conversations related to domestic abuse cases.⁸⁷ In the first conversation, Michelle McCottry, the ex-girlfriend of one defendant, spoke with a 911 operator.⁸⁸ In the second conversation, Amy Hammon, the wife of the other defendant, spoke with police who arrived at her home in response to a domestic disturbance report.⁸⁹ Both women’s statements were admitted in state court based on findings that they were nontestimonial.⁹⁰ The *Davis* Court acknowledged that the nature of both statements was “not as clear” as the statements made in response to police interrogation in *Crawford* and set out the following rule:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁹¹

⁸⁵ *Hammon v. State*, 829 N.E.2d 444, 457–59 (Ind. 2005), *cert. granted*, 546 U.S. 976 (2005); *State v. Davis*, 111 P.3d 844, 849–51 (Wash. 2005), *cert. granted*, 546 U.S. 975 (2005).

⁸⁶ See *Davis v. Washington*, 547 U.S. 813, 822 (2006); see also Rebecca K. Connally, “Out of the Mouth[s] of Babes”: Can Young Children Even Bear Testimony?, *ARMY LAW.*, Mar. 2008, at 1, 13; Christopher Cannon Funk, Note, *The Reasonable Child Declarant After Davis v. Washington*, 61 *STAN. L. REV.* 923, 935 (2009); Grimm, *supra* note 8, at 190–91.

⁸⁷ 547 U.S. at 817, 819.

⁸⁸ *Id.* at 817.

⁸⁹ *Id.* at 819.

⁹⁰ *Id.* at 819, 821.

⁹¹ *Id.* at 822.

That rule, referred to as the “primary purpose” test, did not limit the range of testimonial statements to those statements made in response to police interrogation, but the Court did state in dicta that analysis should focus on the declarant’s intent when making the statement rather than the questioner’s purpose.⁹² Although the primary purpose test helped clarify the testimonial nature of a limited set of statements, the *Davis* Court made it clear that such a test was not an attempt to classify all potential statements or even all statements made in police interrogations.⁹³ Based on that rule, the Court held that McCottry’s statement, made during an ongoing emergency, was nontestimonial and therefore admissible.⁹⁴ However, Hammon’s statements were made during an interrogation during which no such emergency existed.⁹⁵ Those statements were properly classified as testimonial and should have been excluded by the trial court.⁹⁶

The Court also revisited the relationship between the law of evidence and the Confrontation Clause analysis. *Davis* considered the potential cooling effect that a confrontation right could have on potential witnesses—an especially relevant concern in domestic violence cases, where defendants can exert significant influence over alleged victims.⁹⁷ The Court held that the right to confrontation does not abrogate a defendant’s duty to maintain “the integrity of the criminal-trial system.”⁹⁸ The Court refused to enumerate a standard for the showing of wrongdoing required to “extinguish[] confrontation claims” but noted a trend in lower courts of referring to the law of evidence and adopting a preponderance of the evidence standard.⁹⁹ Such a use of the law of evidence relative to Confrontation Clause analysis had been considered and accepted by *Crawford* because “it does not purport to be an alternative means of determining reliability.”¹⁰⁰ *Davis*’s reliance on *Crawford*’s line between

⁹² See *id.* at 822 n.1. Despite the Court’s emphasis on the declarant’s intent, lower courts responded to *Davis*’s formulation of the primary purpose test by focusing on the questioner’s intent in at least one area of law—statements made to police by children who allege sexual abuse. See Funk, *supra* note 86, at 940–43 (“In general, if a court decided that the primary-purpose test applied to a child declarant’s statement, the child’s statement would almost always be testimonial because child abuse victims rarely, if ever, made statements during an ongoing emergency to law enforcement officials or their agents.”).

⁹³ *Davis*, 547 U.S. at 822.

⁹⁴ *Id.* at 827–28.

⁹⁵ *Id.* at 829–32.

⁹⁶ *Id.*

⁹⁷ *Id.* at 832–33.

⁹⁸ *Id.* at 833.

⁹⁹ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (internal quotation marks omitted) (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878))).

¹⁰⁰ *Crawford*, 541 U.S. at 62 (citing *Reynolds*, 98 U.S. at 158–59).

acceptable and unacceptable use of the law of evidence reaffirmed the new relationship between Confrontation Clause doctrine and hearsay doctrine.

C. *MELENDEZ-DIAZ V. MASSACHUSETTS*

Following *Crawford* and *Davis*, the Supreme Court granted certiorari to *Melendez-Diaz v. Massachusetts* and, finding in favor of the defendant-appellant, placed limits on the definition of nontestimonial statements.¹⁰¹ The Court held that a forensic analysis prepared as evidence in a criminal trial is testimonial and therefore subject to the Confrontation Clause.¹⁰² In doing so, *Melendez-Diaz* limited the rationale that lower courts had used to hold statements as nontestimonial; specifically, it explicitly rejected several arguments presented by the State: (1) the analysts were not accusatory and therefore did not produce testimonial statements; (2) the analysts were not providing testimony based on past perception and therefore did not produce testimonial statements; (3) the analysts performed neutral analysis which could not be classified as testimonial; (4) the reports that were produced were business records and therefore nontestimonial; and (5) the defendant's ability to subpoena the analysts fulfilled the requirements of confrontation.¹⁰³ In affirmatively finding the report to be testimonial in nature and rejecting the arguments for classifying it as nontestimonial, the Court limited the classification of other nontestimonial statements.

The Court emphatically placed forensic reports "within the 'core class of testimonial statements'" that had been developed by *Crawford*.¹⁰⁴ The Court referred back to *Crawford*'s inclusion of affidavits in its list of testimonial statements and determined that the reports "quite plainly" fit the *Black's Law Dictionary* definition of "affidavits."¹⁰⁵ The Court noted that the reports were "incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'"¹⁰⁶ and described the functional equivalence between the reports and live testimony.¹⁰⁷ Without direct reference to *Davis*, the Court also discussed

¹⁰¹ 557 U.S. 305, 309–11 (2009).

¹⁰² *Id.* at 308, 310, 329.

¹⁰³ *Id.* at 313, 315, 317, 321, 324.

¹⁰⁴ *Id.* at 310 (quoting *Crawford*, 541 U.S. at 51). Not only was the language of the Court's affirmative argument emphatic, but in discussing the various counterarguments presented by the State, the Court referred to its holding as a "rather straightforward application of . . . *Crawford*," further reinforcing its holding and discounting the State's claims. *Id.* at 312.

¹⁰⁵ *Id.* at 310. The Court made note of the fact that affidavits were mentioned twice by *Crawford* when describing categories of testimonial statements. *Id.*

¹⁰⁶ *Id.* (quoting *Crawford*, 541 U.S. at 51).

¹⁰⁷ *Id.* at 310–11 (citing *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

the purpose of the reports “to provide ‘prima facie evidence’ . . . of the analyzed substance” and held that, because the purpose of the reports “was reprinted on the affidavits themselves,” the analysts knew of that purpose, clearly implicating *Davis*’s primary purpose test.¹⁰⁸

Following its holding that the forensic reports were properly classified as testimonial, the Court continued by finding the State’s “potpourri” of arguments unpersuasive.¹⁰⁹ The Court first addressed the argument that there is no constitutional right to confront forensic analysts who “do not directly accuse [the defendant] of wrongdoing”¹¹⁰ The Court held that the Sixth Amendment separates all witnesses into two categories—either for or against a defendant.¹¹¹ Because forensic analysts provide evidence against a criminal defendant, they must fall into the latter category, regardless of their nonaccusatory nature.¹¹²

The State’s second argument was that there is no constitutional right to confront witnesses who are not “conventional.”¹¹³ The Court considered three ways in which forensic reports may be described as unconventional.¹¹⁴ First, forensic reports are observations made near the time of an analysis, rather than recollections of past events.¹¹⁵ However, the Court noted that *Davis* exercised the right to confrontation based on statements made near the time of the act being described, discounting the effect of a statement’s timing on its testimonial nature.¹¹⁶ Second, forensic analysts do not personally witness a crime or any acts related to a crime.¹¹⁷ The Court dismissed this distinction as unfounded, using an example of a police officer providing testimonial statements about a crime scene that had been investigated.¹¹⁸ Third, forensic reports are not prepared as answers to police interrogations.¹¹⁹ The Court reiterated its previous holding in both *Crawford* and *Davis* that a statement need not be a response to interrogation to be testimonial and then pointed out that the forensic reports at issue had

¹⁰⁸ *Id.* at 311 (quoting MASS. ANN. LAWS. ch. 111, § 13 (LexisNexis 2004)).

¹⁰⁹ *Id.* at 312.

¹¹⁰ *Id.* at 313.

¹¹¹ *Id.* (citing U.S. CONST. amend. VI) (contrasting the Confrontation Clause with the Compulsory Process Clause, which guarantees a defendant the right to call witnesses to support his defense).

¹¹² *Id.*

¹¹³ *Id.* at 315.

¹¹⁴ *Id.* at 315–17.

¹¹⁵ *Id.* at 315.

¹¹⁶ *Id.* at 316.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

been prepared in response to a police request.¹²⁰ Not only did the Court reaffirm the rule that statements not made during interrogation could be testimonial, but it broadened the concept of interrogation to expressly include a “response to a police officer’s request to ‘write down what happened’” as well as a police request for forensic reports.¹²¹

The third argument the Court addressed was the claim that forensic reports should not be subject to the Confrontation Clause because they are the product of neutral, mechanical testing by people who would not be inclined to change their opinion if forced to testify in the presence of the accused.¹²² The Court rejected both the argument’s premise that the testing done could be absolutely neutrally and the conclusion that a factor other than confrontation could weigh on the admissibility of a testimonial statement.¹²³ The Court considered that the State could “be right that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test,” but held firm that “the Constitution guarantees one way: confrontation.”¹²⁴ Finally, the Court clearly held that no amount of reliability could circumvent the right to confrontation when dealing with testimonial statements. Also, questioning the assumption that the testing was neutral and reliable, the Court pointed to the use of the Confrontation Clause in “weed[ing] out not only the fraudulent analyst, but the incompetent one as well.”¹²⁵ Although the Court recognized that the analysts followed standard methods, it identified that “some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.”¹²⁶

The State’s fourth argument was that forensic reports are similar to business records and therefore are not subject to the Confrontation Clause.¹²⁷ Similar to the way it repudiated the previous analysis, the Court rejected the argument forcefully.¹²⁸ The Court held that forensic reports, like police reports, are expressly removed from the category of business records in the law of evidence because they are created for use in court.¹²⁹

¹²⁰ *Id.* at 316–17.

¹²¹ *Id.* at 317 (citations omitted).

¹²² *Id.*

¹²³ *Id.* at 317–18.

¹²⁴ *Id.* at 318.

¹²⁵ *Id.* at 319.

¹²⁶ *Id.* at 320 (citing 2 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 23.03[c], at 532–33 (4th ed. 2007); James M. Shellow, *The Application of Daubert to the Identification of Drugs*, 2 SHEPARD’S EXPERT & SCI. EVIDENCE Q. 593, 600 (1995)).

¹²⁷ *Id.* at 321.

¹²⁸ *Id.* at 321–22.

¹²⁹ *See id.* (citing FED. R. EVID. 803(6), (8)).

The Court then revisited *Crawford* to reaffirm the separation of Confrontation Clause analysis and the law of evidence:

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. . . . Business and public records are generally admissible absent confrontation *not because they qualify under an exception to the hearsay rules*, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts’ statements here—prepared specifically for use at petitioner’s trial—were testimony against petitioner¹³⁰

By rejecting the use of hearsay exceptions as alternatives to ensuring reliability through confrontation the Court, as it did in *Davis*, reaffirmed the relationship between Confrontation Clause analysis and the law of evidence.¹³¹

The fifth argument the Court addressed was the claim that the defendant’s ability to subpoena the forensic analysts satisfied the right to confrontation.¹³² Here, the Court found that the power to subpoena a witness does not fulfill the prosecution’s affirmative obligation to present its witnesses for cross-examination.¹³³

Beyond simply holding that forensic reports are testimonial, *Melendez-Diaz* shaped Confrontation Clause doctrine by limiting the rationale under which statements can be found to be nontestimonial. Just because a statement is nonaccusatory, unusual, or supposedly neutral, does not remove it from the class of statements that require confrontation.¹³⁴ Instead, the Court remained focused on the purpose of the statement—whether it was made to be used against the accused as evidence at trial.¹³⁵ This question of purpose guided the Court’s opinion in *Melendez-Diaz*, which ultimately classified forensic reports as testimonial.¹³⁶

D. *BULLCOMING V. NEW MEXICO*

Two years after *Melendez-Diaz*, the Supreme Court issued its opinion in *Bullcoming v. New Mexico*.¹³⁷ *Bullcoming* expanded the holding of *Melendez-Diaz* by considering the use of surrogate testimony, that is,

¹³⁰ *Id.* at 324 (emphasis added).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 315–17.

¹³⁵ *Id.* at 324.

¹³⁶ *Id.* at 310.

¹³⁷ 131 S. Ct. 2705 (2011).

testimony (including cross-examination) from an analyst who was not directly involved in creating the forensic report being offered, but who was familiar with the procedure.¹³⁸ *Bullcoming* held that the use of surrogate witnesses removed from the actual analysis did not fulfill the requirements of the Confrontation Clause.¹³⁹ *Bullcoming* also bolstered the Court's holding in *Melendez-Diaz* by rejecting more State arguments for categorizing the forensic analysis at issue as nontestimonial.¹⁴⁰

Bullcoming first expanded the Court's Confrontation Clause doctrine by explaining why cross-examining the surrogate witness at issue did not fulfill the requirement of the Clause.¹⁴¹ The New Mexico Supreme Court had allowed the surrogate witness to testify in a felony drug case because it concluded that the analyst only presented the results generated by the machine used to identify the compound's component substances and did not interpret those results or exercise any independent judgment.¹⁴² However, in its review of the analyst's testimony, the Supreme Court pointed out remarks about receiving a blood sample, the type of test used and what procedures were followed by the analyst who performed it, and the lack of any factor that affected the results of the analysis.¹⁴³ Rejecting the suitability of the surrogate witness, the Court analogized the analyst's report to a police report recording the address on the door of a house or the speed that popped up on a radar gun reading, holding that the Confrontation Clause required more than the availability of any police officer familiar with the technology and methodology of gathering that information for the report.¹⁴⁴ The Court expressed a specific interest in ensuring the right to confrontation for the purpose of conveying what the declarant "knew or observed about the events" that generated the testimony and "expos[ing] any lapses or lies on the certifying analyst's part."¹⁴⁵ In the opinion of the Court, cross-examining an analyst who had no firsthand knowledge of the analysis in question could not satisfy the demands of the Confrontation Clause.¹⁴⁶

¹³⁸ *Id.* at 2711–12.

¹³⁹ *Id.* at 2713.

¹⁴⁰ *Id.* at 2714–17.

¹⁴¹ *Id.* at 2714–16.

¹⁴² *Id.* at 2714.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2714–15.

¹⁴⁵ *Id.* at 2715. The specific language the Court chose, "lapses or lies," recalls the holding of *Melendez-Diaz*, which described "weed[ing] out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009).

¹⁴⁶ *Bullcoming*, 131 S. Ct. at 2713.

The Court also rejected arguments for classifying the analysis as nontestimonial.¹⁴⁷ Citing *Melendez-Diaz*, the Court dismissed claims that the analysis was not necessarily subject to confrontation because it was not adversarial.¹⁴⁸ The Court also rejected an argument that the analysis was nontestimonial because, unlike the analysis in *Melendez-Diaz*, it had not been “sworn to before a notary public.”¹⁴⁹ Citing portions of *Crawford* and *Davis* that had foreseen such an argument and rejected it, the Court refused to accept that the right to confrontation would be so “easily erasable.”¹⁵⁰

Relying heavily on *Melendez-Diaz*, *Bullcoming* was not a drastic addition to, or departure from, the groundwork that the three cases discussed previously had laid. However, it did serve to reinforce the Supreme Court’s stance regarding forensic analysis, and it furthered the exploration of the testimonial nature of scientific testing by relying on a rigorous evaluation of the nonmechanical contents of the analysis.

III. *ORM HIENG*’S ANALYSIS OF POLICE INTERPRETER STATEMENTS’ ADMISSIBILITY

A. MAJORITY’S TREATMENT OF *NAZEMIAN* POST-*CRAWFORD*

In *Orm Hieng*, the Ninth Circuit faced a challenge to *Nazemian* based on *Crawford* and its companion cases.¹⁵¹ The Ninth Circuit panel, in determining whether *Nazemian* had been overruled, analyzed whether the *Crawford* line of cases had “undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are *clearly irreconcilable*.”¹⁵²

The three-judge panel first distinguished between the thrust of the *Crawford* cases and the holding of *Nazemian*. The *Crawford* cases focused on the testimonial–nontestimonial distinction, where testimonial statements must be subject to confrontation.¹⁵³ The threshold determination of to whom an interpreted statement must be attributed was not directly

¹⁴⁷ *Id.* at 2716–17.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2717 (quoting *Melendez-Diaz*, 557 U.S. at 308) (internal quotation marks omitted).

¹⁵⁰ *Id.*

¹⁵¹ *United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012) (“Hieng argues that *Nazemian* has been overruled by *Crawford v. Washington* and its progeny.” (citation omitted)).

¹⁵² *Id.* (emphasis added) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)) (internal quotation marks omitted).

¹⁵³ *Id.* at 1140.

addressed by any of the *Crawford* cases.¹⁵⁴ Therefore, only if the language of the *Crawford* cases made that threshold determination clearly irreconcilable with current doctrine would the panel have been able to set *Nazemian* aside.

The court held that the *Crawford* cases did not clearly imply that *Nazemian*'s threshold determination was invalid.¹⁵⁵ The panel conceded that *Nazemian*'s test stems from the law of evidence but held that the *Crawford* cases "provide no clear guide with respect to the interplay, if any, between the Confrontation Clause and the law of evidence."¹⁵⁶ Although the panel considered that "*Crawford* might be read as essentially divorcing Sixth Amendment analysis from the law of evidence," it held that based on repeated references to the law of evidence within *Crawford* and *Davis* such a divorce was not clear enough to find clear irreconcilability.¹⁵⁷ According to the *Orm Hieng* panel, the standard of clear irreconcilability was too high a bar for the language of the *Crawford* court to satisfy.¹⁵⁸

B. JUDGE BERZON'S CONCURRENCE

Judge Berzon's concurrence did not directly attack the majority's reasoning, because she agreed that a three-judge panel lacked the appropriate authority to decide the issue.¹⁵⁹ However, the judge's argument pressed for en banc review of *Nazemian*'s continued application post-*Crawford*.¹⁶⁰ The Ninth Circuit procedural rules would allow such a review to confront the *Orm Hieng* majority's reasoning with a higher level of scrutiny than a three-judge panel would bring to bear, changing the analysis from "clear irreconcilability" to a more searching treatment of preemption by *Crawford* doctrine.¹⁶¹

In support and anticipation of en banc review, Judge Berzon offered two arguments that the *Crawford* line of cases overruled *Nazemian*. First, she briefly alluded to *Nazemian*'s reliance on "unity between hearsay

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1141.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1140–41.

¹⁵⁸ *Id.* at 1139, 1141.

¹⁵⁹ *Id.* at 1145 (Berzon, J., concurring) ("I agree with the opinion's conclusion that *United States v. Nazemian* is not so 'clearly irreconcilable' with *Crawford v. Washington* as to permit a three-judge panel to overrule *Nazemian*" (internal citations omitted)).

¹⁶⁰ *Id.*

¹⁶¹ The Ninth Circuit Court of Appeals, when sitting en banc, has discretion over the standard of review it applies. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995 (9th Cir. 2003).

concepts and Confrontation Clause analysis” that was no longer valid.¹⁶² Second, she identified tension between *Nazemian*’s implicit trust in the accuracy and independence of interpreters and the *Crawford* cases’ scrutiny of forensic reports.¹⁶³ Although neither argument indicated a clear irreconcilability between *Nazemian* and the *Crawford* cases to the panel, both arguments provide strong support for a future en banc finding that *Nazemian* is no longer good law post-*Crawford*.

1. *Nazemian*’s Reliance on an Outdated “Unity Between Hearsay Concepts and Confrontation Clause Analysis”

The argument that *Nazemian* has been overruled because of its reliance on an outdated connection between hearsay law and Confrontation Clause doctrine can be broken into two analytical questions: (1) Was the holding related to the Confrontation Clause in *Nazemian* premised on the law of evidence?; and (2) have the *Crawford* cases made the Confrontation Clause independent from whatever evidentiary principles *Nazemian* relied on, such that testimony that meets the evidentiary requirements does not necessarily meet the Confrontation Clause requirements? The nature of the language suggests that the answer to both questions is yes, and further suggests that modern Confrontation Clause doctrine is too divorced from the evidentiary principles that formed the foundation of *Nazemian*’s holding for the rationale used in *Nazemian* to persist as valid law.

a. *Nazemian*’s Reliance on the Law of Evidence

By adopting agency theory, language conduit theory, and analogizing to adoptive admissions, *Nazemian* relies on evidentiary principles. All three of these doctrines, each of which applied to Confrontation Clause analysis under *Roberts*, can be linked to the law of evidence.

Agency theory was one of the two theories that *Nazemian* explicitly hybridized into its test to determine the source of interpreted statements.¹⁶⁴ Agency theory provides that interpreters are in fact agents of the criminal defendant being interrogated, so long as the interpreter is capable and has no reason to falsify a translation.¹⁶⁵ Therefore, under the Federal Rules of Evidence, any of the interpreter’s statements are attributable to the

¹⁶² *Orm Hieng*, 679 F.3d at 1149.

¹⁶³ *Id.*

¹⁶⁴ *See United States v. Nazemian*, 948 F.2d 522, 526–28 (9th Cir. 1991).

¹⁶⁵ *United States v. Da Silva*, 725 F.2d 828, 831–32 (2d Cir. 1983).

defendant and do not qualify as hearsay.¹⁶⁶ Although the agency theory did not form the entire basis of *Nazemian*'s test, it remains part of the *Nazemian* analysis and carries with it a direct connection to evidentiary principles.

Nazemian also adopted the language conduit theory.¹⁶⁷ Language conduit theory is a common law construction that allows a court to attribute a translated statement to the non-English speaker, rather than the interpreter, when the interpreter acted only as a "language conduit."¹⁶⁸ Although not directly connected to the law of evidence, language conduit theory shares the principles of agency theory and informs courts that adopt agency theory by allowing them to attribute statements directly to a defendant.¹⁶⁹ As with agency theory, factors related to the interpreter's reliability play a role in the determination of whether that interpreter is a language conduit.¹⁷⁰ That language conduit theory was essentially similar to agency theory suggests that it was at least implicitly connected to the law of evidence.

Nazemian also analogized its holding to the doctrine of adoptive admission.¹⁷¹ Adoptive admission allows a court to attribute a third-party statement to a criminal defendant who affirmatively adopted that statement as her own.¹⁷² Under the Federal Rules of Evidence, such an adoption falls within the same set of hearsay exclusions that exclude statements by a party's agent.¹⁷³ That attribution then qualifies as a "special indic[um] of reliability" that obviates the right to confrontation.¹⁷⁴ Like *Nazemian*'s language conduits, adoptive admission "avoid[s] the confrontation problem because the words of the hearsay become the words of the defendant."¹⁷⁵

¹⁶⁶ See FED. R. EVID. 801(d)(2)(D) (explaining that statements by a defendant's agent are not hearsay).

¹⁶⁷ See *Nazemian*, 948 F.2d at 526–28.

¹⁶⁸ Language conduit theory stems from a per curiam opinion by the Ninth Circuit that did not provide a method for differentiating between language conduits and other interpreters. See *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973) (per curiam).

¹⁶⁹ See *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989); *Da Silva*, 725 F.2d at 832.

¹⁷⁰ See *Koskerides*, 877 F.2d at 1135.

¹⁷¹ *Nazemian*, 948 F.2d at 526.

¹⁷² *Poole v. Perini*, 659 F.2d 730, 733 (6th Cir. 1981). For example, imagine a defendant, Smith, is told "your buddy Jones says you two had been watching the bank every day at 8:00 a.m. for the week leading up to the heist." If Smith responds, "yeah," then at trial the prosecutor may introduce Jones's statement as Smith's own statement—not simply the "yeah" that Smith actually said.

¹⁷³ FED. R. EVID. 801(d)(2)(B), (D).

¹⁷⁴ *Perini*, 659 F.2d at 733.

¹⁷⁵ *Nazemian*, 948 F.2d at 526 (quoting *Perini*, 659 F.2d at 733) (internal quotation marks omitted).

Like agency theory, adoptive admission is directly based on the law of evidence.

Each of the three principles that formed the basis of *Nazemian*'s holding—agency theory, language conduit theory, and adoptive admission—connect, at least implicitly, to the law of evidence. All three doctrines conform to hearsay exclusions that attribute third-party statements to a party involved in the case. The majority in *Orm Hieng* accepted as much, saying that “[o]ur threshold inquiry in *Nazemian* . . . stems from principles of the law of evidence.”¹⁷⁶

b. *Crawford*'s Separation of Confrontation and Hearsay

Less clear to the *Orm Hieng* court was the new relationship between the Confrontation Clause analysis and the law of evidence.¹⁷⁷ However, the language of the *Crawford* cases strongly suggests that, whatever the exact relationship between the two may be, the law of evidence as relied upon by *Nazemian* should no longer prejudice a defendant's right to confrontation.

In several instances, *Crawford* indicated that the relationship between the law of evidence and the Confrontation Clause analysis that existed under *Roberts* needed to change. *Crawford* “reject[ed] the view that the [application of the] Confrontation Clause . . . to out-of-court statements introduced at trial depends upon ‘the law of Evidence for the time being.’”¹⁷⁸ *Crawford* explained that *Roberts*'s flaw was its acceptance of “the vagaries of the rules of evidence” and “amorphous notions of ‘reliability’” in the face of the Constitution's requirement that defendants be able to confront testimonial witnesses, and the Court held that no such doctrine could “be a surrogate means of assessing reliability” of testimonial statements.¹⁷⁹ However, *Crawford* did not wholly remove the law of evidence from Confrontation Clause analysis; it held that evidentiary rules that “[do] not purport to be an alternative means of determining reliability” may still create exceptions to the Confrontation Clause.¹⁸⁰

¹⁷⁶ *United States v. Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012).

¹⁷⁷ *Id.* at 1141 (“[T]he Court's recent Confrontation Clause cases provide no clear guide with respect to the interplay, if any, between the Confrontation Clause and the law of evidence.”).

¹⁷⁸ *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004) (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 1397, at 101 (2d ed. 1923)) (citing *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring)).

¹⁷⁹ *Id.* at 61–62.

¹⁸⁰ *Id.* at 62.

This distinction between applicable evidentiary doctrine and inapplicable doctrine, although not fully examined, has remained valid through the cases that followed *Crawford*. *Davis* reiterated the applicability of the rule of forfeiture, which is codified in Federal Rule of Evidence 804(b)(6).¹⁸¹ *Melendez-Diaz* separated the general Confrontation Clause classification of business and public records as nontestimonial statements from the evidentiary application of business and public record hearsay exceptions, making it clear that even if the hearsay exception should apply, such an indication of reliability would not resolve the confrontation issue.¹⁸²

Based on the Court's holding that the law of evidence cannot supply an alternative means of determining a statement's reliability for the purpose of Confrontation Clause analysis, *Nazemian*'s holding is invalid. *Nazemian*'s application of the law of evidence is "an alternative means of determining reliability."¹⁸³ Statements admissible under *Nazemian* are reliable because an agent of the defendant or a language conduit for the defendant makes them, allowing the law of evidence to impute the statement to the defendant. It is only that determination, based on the law of evidence, which allows courts to impute an interpreter's statements to a defendant and avoid the requirement of permitting the defendant to confront that person. Furthermore, the doctrine to which *Nazemian* analogized its holding, adoptive admissions, is used expressly as a method for finding "special indicia of reliability which would justify an exception to the requirement of cross-examination."¹⁸⁴ Such indicia could get around the Confrontation Clause under *Roberts*, but not so under *Crawford*. The evidentiary law rules established by the basis of *Nazemian*'s Confrontation Clause analysis thus conflict with the *Crawford* cases and should be declared invalid.

2. Tension Between *Nazemian* and the Treatment of Forensic Reports

Judge Berzon's next claim relied on a comparison between forensic analysis and interpretation. Judge Berzon argued:

¹⁸¹ *Davis v. Washington*, 547 U.S. 813, 833 (2006); *see also* FED. R. EVID. 804(b)(6). The rule of forfeiture denies the right of confrontation to a defendant who wrongly prevents a witness from appearing at trial. *See Giles v. California*, 554 U.S. 353, 366–68 (2008).

¹⁸² *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

¹⁸³ *Crawford*, 541 U.S. at 62.

¹⁸⁴ *Poole v. Perini*, 659 F.2d 730, 733 (6th Cir. 1981).

Translation from one language to another is much *less* of a science than conducting laboratory tests, and so much more subject to error and dispute. Without the ability to confront the person who conducted the translation, a party cannot test the accuracy of the translation in the manner in which the Confrontation Clause contemplates.¹⁸⁵

Comparing those two disciplines in the context of the *Crawford* cases supports the conclusion that defendants should have the right to confront the interpreters of their statements during police investigation. This is so, first, because interpretation is conducted both in response to police requests and for the purpose of gathering evidence against the accused; second, because confrontation is used to minimize the effect of incompetent and fraudulent interpreters; and third, because qualities of the interpreter are irrelevant to showing his reliability.

Both *Melendez-Diaz* and *Bullcoming* made clear that forensic analysis is subject to the right to confrontation. The Court referenced how affidavits were included in the list of core testimonial statements,¹⁸⁶ how the purpose of the forensic reports was to establish facts to be used at trial, and how similar the forensic reports were to live testimony. Like forensic reports, interpretation for a police interrogation fits into a “core class of testimonial statements”—police interrogations.¹⁸⁷ Also like forensic reports, the purpose of an interpretation is to establish facts that can be used at trial. In addition, an interpreter’s statements are exactly what the police officer will be testifying to at the trial. Based on these three key qualities of interpreter statements, an interpreter in a police interrogation should be subject to confrontation.

Melendez-Diaz and *Bullcoming* also discussed the importance of confrontation as a procedural tool that reveals and screens unreliable witnesses.¹⁸⁸ No amount of safeguards within the field of interpretation is likely to eliminate all possibility of error or misrepresentation, and the Court, in the *Crawford* cases, has acknowledged the value that the Constitution places on face-to-face confrontation as a method of limiting that danger. Just as confrontation of forensic analysts can “expose any lapses or lies,” confrontation of interpreters can do the same.¹⁸⁹

Finally, the factors that *Nazemian* relied upon to differentiate between language conduits and interpreter-declarants, as well as other factors that

¹⁸⁵ *United States v. Orm Hieng*, 679 F.3d 1131, 1149 (9th Cir. 2012) (Berzon, J., concurring).

¹⁸⁶ The Court made it clear that the forensic reports qualified as affidavits. *Melendez-Diaz*, 557 U.S. at 310.

¹⁸⁷ *Crawford*, 541 U.S. at 51, 68 (internal quotation marks omitted).

¹⁸⁸ *Melendez-Diaz*, 557 U.S. at 318–21; *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715–16 (2011).

¹⁸⁹ *Bullcoming*, 131 S. Ct. at 2715.

may have made lower courts more willing to admit interpreter statements, have been deemed irrelevant by the *Crawford* cases. Alternative means of determining reliability—including considering which party supplied the interpreter, any motivation the interpreter may have had to distort the conversation or mislead the parties, the interpreter's skill along with any qualifications, and whether any acts following the conversation were consistent with the translated statements—are all irrelevant under *Crawford*.¹⁹⁰ Likewise, the perception that an interpreter is nonaccusatory, unusual, or neutral offers no escape from the Confrontation Clause.¹⁹¹ No language in the *Crawford* cases suggests that interpreters should fare any differently under the Confrontation Clause than do forensic analysts.

CONCLUSION

Non-English-speaking defendants who make statements to police through an interpreter face a frightening proposition. As the *Miranda* warning indicates, anything they say can be used against them. However, thanks to the language barrier, anything the defendants' interpreters say, and *not* anything the defendants say, ends up being used against them. The defendant must rely on that interpreter to navigate linguistic and cultural differences to deliver their words faithfully to the interrogating officer, and through that officer, to the American justice system.

The Sixth Amendment guarantees defendants the right to be confronted by the witnesses against them and has been interpreted to grant the right to confront any testimonial witness, explicitly including third parties who respond to police interrogations and forensic analysts, among others. According to the Supreme Court, no indicia of reliability are enough to deny that right to confrontation so long as the witness's statements are testimonial—adverse to the defendant and made for the purpose of providing evidence at trial. The Ninth Circuit will likely be faced with a challenge to its twenty-year-old holding in *Nazemian* that interpreters need not be subjected to confrontation. The court should take that opportunity to review the issue en banc and hold that the modern course of the Confrontation Clause doctrine has invalidated its precedent.

¹⁹⁰ See 541 U.S. at 61–62 (“[T]he Clause[] . . . commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

¹⁹¹ See *Melendez-Diaz*, 557 U.S. at 313–21.